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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1954.

No. .

LAURA B. HOPKINS, ADMINISTRATRIX OF THE ESTATE OF HOWARD T. HOPKINS, DECEASED,

Petitioner,

v.

E. I. DUPONT DE NEMOURS AND COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Laura B. Hopkins, Administratrix of the Estate of Howard T. Hopkins, deceased, respectfully prays that a writ of certiorari issue out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Third Circuit, rendered on May 14, 1954, which reversed a judgment of the United States District Court for the Eastern District of Pennsylvania entered on a jury verdict in favor of petitioner, and to further review the order of the said Court of Appeals, entered on June 15, 1954, denying petitioner's Petition for Rehearing Before the Court En Banc.

OPINIONS BELOW.

The District Court did not render an Opinion.

The Opinion of the Court of Appeals, rendered on May 14, 1954, is reported in 212 F. 2d 623 and is appended hereto (Appendix A).

The Petition for Rehearing Before the Court En Banc was denied without Opinion.

JURISDICTION.

The judgment of the Court of Appeals reversing the judgment of the District Court was dated and entered on May 14, 1954.

A Petition for Rehearing Before the Court En Banc, timely filed, was denied by order dated and entered on June 15, 1954.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. A. Sec. 1254(1).

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Whether the Court below, by its present decision, rendered by a panel composed of Circuit Judges Maris, Staley and Hastie, has created a conflict with, and a reversal of the law of this case as established by, the decision of the Court of Appeals for the Third Circuit on a prior appeal in this case in *Hopkins v. DuPont de Nemours & Co.*, 199 F. 2d 930 (Appendix B), rendered by a different panel composed of Circuit Judges Goodrich, McLaughlin and Staley, as well as conflict with the law of Pennsylvania, and has by the present decision, so far usurped the function of the jury as to deprive petitioner of her right to a trial by jury.

2. Whether, assuming a showing of such conflict between the decisions in the first and second appeals in this case, decided respectively by different panels, the denial of the Petition for Rehearing Before the Court En Banc so far

departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

3. The judgment below was rendered by a panel of *three* Circuit Judges. Under these circumstances was the en banc power, conferred upon Courts of Appeals by 28 U. S. C. A. Sec. 46(a) erroneously exercised by the Court below in its denial of the Petition for Rehearing Before the Court En Banc, where the Rules adopted by the Court below provide, on the one hand, that petitions for rehearing will not be granted unless a judge who concurred in the judgment desires it or the court which rendered it so determines, and provide, on the other hand, that a rehearing en banc may not be had unless ordered by a majority, that is to say *four,* of the active Circuit Judges.

RULES OF COURT INVOLVED.

Rules 4(3), 5(2), 5(3) and 33 of the Rules of the United States Court of Appeals for the Third Circuit, which are as follows:

> "4(3) *Court and Divisions—Number of Judges To Sit—Court In Banc.* Cases and controversies shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the court in banc is ordered by a majority of the active circuit judges. The court in banc shall consist of all the active circuit judges of the circuit."

> "5(2) *Cases To Be Heard By Judges So Assigned.* All matters pending in the court, except matters assigned to a division, matters directed to be heard or reheard by the court in banc and further proceedings in appeals and petitions previously heard by the court on the merits, shall be heard and decided by the judges who have thus been assigned to sit in the court at the time of hearing, if practicable."

"5(3) *Exceptions.* Further proceedings in appeals and petitions previously heard by the court on the merits, except petitions for rehearing, shall be heard and determined by the judges who heard the original appeal or petition, if practicable. Petitions for rehearing shall be disposed of in the manner provided by Rule 33. If a rehearing is granted the reargument shall be heard by the judges of the court or by the division which heard the original argument, if practicable, unless it is ordered by a majority of the active circuit judges to be heard by the court in banc."

"33. *Petitions For Rehearing—When Filed—Form—Oral Argument.* A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court. It must be printed, and briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument and will not be granted, unless a judge who concurred in the judgment desires it, or the court or the division which rendered it so determines."

STATEMENT OF THE CASE.

Petitioner brought the present action under the Pennsylvania wrongful death and survival statutes on behalf of the estate of the deceased. Jurisdiction of the District Court was based upon diversity of citizenship. The case has twice been tried. At the first trial the Court, on respondent's motion, dismissed the action at the conclusion of petitioner's case on the ground that the evidence failed to establish actionable negligence on the part of the respondent. On appeal the Court of Appeals for the Third Circuit reversed and remanded the Cause for a new trial. *Hopkins v. E. I. DuPont de Nemours & Co.*, 199 F. 2d 930. The second trial resulted in a verdict and judgment for peti-

tioner in the sum of $35,000.00 (510a),[1] which the Trial Judge refused to disturb on respondent's motion for a new trial and for judgment notwithstanding the verdict (510a). On respondent's appeal the Court below reversed the judgment, holding that the motion for judgment notwithstanding the verdict should have been granted since the evidence failed to establish actionable negligence on the part of the respondent. *Hopkins v. E. I. DuPont de Nemours & Co.*, 212 F. 2d 623. The first appeal was decided by a panel composed of Circuit Judges Goodrich, McLaughlin and Staley. The second appeal was decided by a panel composed of Circuit Judges Maris, Staley and Hastie, who likewise denied the Petition for Rehearing Before the Court En Banc.

Briefly, decedent met his death in a highway construction accident as the result of a premature explosion of dynamite manufactured by respondent and sold to decedent's employer, C. J. Langenfelder and Co. for use in blasting. Decedent was a loader of dynamite. On the day of the accident his blasting crew was engaged in bringing a portion of the proposed Pennsylvania Turnpike down to grade. To accomplish this, a pattern of some three hundred boreholes was drilled, vertically, on five foot centers, in the rock to be removed. According to customary procedure, the loaders followed close behind the drillers, with an interval of possibly five minutes between drilling and loading. About 5:30 P. M. the decedent was observed working over a completely loaded and tamped borehole, coiling the cap wires around his hand, the usual practice followed after a hole is loaded. Another hole was being drilled some five to six feet away. A few seconds later, without apparent cause, the loaded charge exploded resulting in fatal injuries.

Petitioner's evidence, held to be competent and sufficient on both appeals, established that the premature ex-

1. Unless otherwise noted, record references relate to Appellant's Appendix on the second appeal.

plosion was caused by either one or a combination of two hazards inherent in the normal and customary method of drilling and loading: heat generated within the borehole by drilling in hard rock, or shock impact caused by drilling another hole in close proximity to a charged borehole. Petitioner further established that respondent gave no warning of these hazards, nor did it prescribe precautionary measures to avoid them. Relying upon the Pennsylvania Supreme Court decision in *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850, it was plaintiff's theory that blasting workers are not sufficiently aware of the precise nature of these hazards to enable them to take intelligent and effective precautionary measures to avoid them; that their knowledge of the characteristics of dynamite, the external forces to be guarded against, and the reaction of explosives to such forces, is limited to the rough and necessarily inaccurate and incomplete information gained by using it in the field, and that the level of knowledge necessary to discover and avoid the perils inherent in the use of explosives under the conditions here disclosed belongs to the trained scientific observer; that under these circumstances it was the duty of respondent, being the manufacturer of a highly dangerous product, to warn the user against these hazards and to prescribe the conditions for its safe use, for it was because of lack of adequate knowledge on the part of blasting workers, due to respondent's failure to warn against the precise nature of the hazards to be encountered, and to formulate adequate precautionary measures, that procedures which were in fact improper and dangerous were unwittingly employed.

As will be more fully developed in our argument directed to the first reason relied upon for granting the writ, the decision below turns solely upon the holding that upon the evidence adduced the jury could not reasonably have concluded that the users of dynamite were unaware of the heat hazard generated by drilling. This issue of lack of

adequate knowledge was in this case from its inception. On the first appeal the Court below, adopting the principle of the *Maize* decision, *supra* (352 Pa. 51) held that the evidence presented a jury question. On the second appeal the Court held to the contrary, stating:

> (212 F. 2d at p. 625; Appendix A) "On the first appeal, we believed that a jury might reasonably have concluded that the defendant should have given some warning of the danger because it appeared that blasting workers and those supervising their operations, both generally and in this very case, were uninformed of the heat hazard involved in the customary procedure of loading almost immediately after drilling. However, on the present record we reach a different conclusion."

The rehearing before the Court en banc was sought on a petition which urged, in substance, that the two decisions, when viewed in the context of the respective trial records, were squarely in conflict; that the record as made on the second trial was, on the very question which the Court held decisive, more favorable to the petitioner than the first; that the Court was evidently unaware that evidence which it considered as fatal to petitioner's case on the issue of the user's knowledge was equally present in the records in both appeals; and that, because the Court imperfectly apprehended the precise nature of this issue, it failed to give consideration to weighty and substantial evidence, favorable to the petitioner, which necessarily left the issue of adequate knowledge a question of fact for the jury. In order to resolve what is not merely a conflict within the Circuit, but what is in fact a direct reversal of the law of the case as established on the first appeal by a different panel of judges, it was urged, in the interests of appellate policy, that the ultimate decision in this case be rendered by the entire Court, with opportunity afforded to petitioner to fully present argument on the question.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 340

LAURA B. HOPKINS, Administratix of the Estate of Howard T. Hopkins, Deceased,
Petitioner,

v.

E. I. DuPONT de NEMOURS and COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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REASONS RELIED UPON FOR GRANTING THE WRIT.

First Point. The Decision Below Is in Direct Conflict With the Decision in the Same Case on the First Appeal and With the Law of Pennsylvania. It Represents a Serious Miscarriage of Justice in That the Court Has Usurped the Function of the Jury in a Way Which Has Deprived Petitioner of Her Right to a Trial by Jury.

We are mindful of the fact that this Court will not, and indeed cannot, undertake the heavy burden of re-examining the facts and analyzing the testimony, in extenso, as presented by the two trial records here involved. Nor do we think that this is necessary, for we earnestly believe that the existence of conflict as well as a serious miscarriage of justice can be convincingly demonstrated by a very limited resort to the record.

On the first appeal the Court below held that petitioner had made out a submissible case to the jury, and established the law of the case in these terms:

> (199 F. 2d at p. 933) ". . . One who supplies an instrumentality for use by others and who knows or should know that the foreseeable use is dangerous to human life unless certain precautions are taken, *and who realizes or should realize that the probable user will not recognize the danger,* is under a duty to warn the user of such danger, and to advise the proper precautions." (Emphasis supplied.)

As will be more fully developed shortly, the foreseeable dangers inherent in the procedures unwittingly employed by the blasters, as established at the first trial, were: first, drilling within close proximity to a loaded borehole, thus resulting in exposure to the danger of detonation by the shock impact set up by the drill rig; second, loading a

freshly drilled hole before the dangerous temperatures generated therein had been sufficiently dissipated; and thirdly, (assuming the jury believed certain evidence developed through one of petitioner's witnesses, Keller, under cross-examination) relying upon a so-called "tamping pole" test to determine the heat of the borehole. The second trial established the same inherent dangers and the same failure to warn on the part of the respondent. Nonetheless, on the second appeal, the verdict for petitioner was set aside and judgment entered for the respondent. The basis for the decision is a narrow one and merits careful examination.

Since the manufacturer's duty to warn against a hazard inherent in the use of its product, and to prescribe the conditions for its safe use does not exist unless the user is unaware of the hazard and is not cognizant of the proper precautions to be taken, the present decision correctly starts with the proposition that the burden of establishing lack of such knowledge is upon the petitioner. In this respect, the present decision is consistent with the decision on the first appeal. The Court below now holds, however, in direct conflict with the first decision, that:

> (212 F. 2d at p. 626) "There is no evidence that the user was uninformed of the heat hazard said to be incidental to the normal drilling of boreholes. To the contrary, the only affirmative evidence on this issue showed that the foreman had such information, believed the very temperature which plaintiff claims to have existed here would have been dangerous and directed such precautions as he deemed adequate to prevent the loading of dynamite in a dangerously hot hole."[2]

From this premise the Court concludes that DuPont had discharged its full obligation under the law so far as

2. The Court is here referring to the testimony of Keller, Langenfelder's blasting foreman, concerning the use of a so-called tamping pole test.

the heat hazard is concerned. If the Court was correct in both the premise and the conclusion, then the verdict was correctly set aside.

We earnestly suggest that both the premise and the conclusion are clearly erroneous and in conflict with the Court's prior decision.

Essentially, the *premise* is based upon the erroneous view that a party is bound by the testimony of his witness, in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Johnson v. Baltimore & O. R. Co.*, 208 F. 2d 633 (December 18, 1953 per Circuit Judges Goodrich, McLaughlin and Kalodner), holding that a party is not so bound, and that a jury may accept or reject all or any part of the testimony of a witness, *whether called by plaintiff or defendant.* In thus proceeding upon an erroneous and conflicting principle, the Court below ignored and declined to give any effect to other weighty and substantial evidence in petitioner's case which necessarily left the issue of adequate knowledge a question of fact for the jury. In essence, the Court below now substitutes *its* finding of fact for that of the jury, and that *on an erroneous issue,* for the issue is not merely *some* knowledge, but *adequate* knowledge, as the Court on the first appeal held:

> (199 F. 2d at pp. 933-934) "But plaintiff's theory does not go to the *generally* dangerous character of dynamite. She contends that what is not known by blasting workers is that there is enough heat and vibration in a freshly drilled hole, when a drill is operated a few feet away, to explode the dynamite placed in the hole. Everybody knows that dynamite should not be thrown in a fire, but apparently most construction workers do not know that it should not be placed in a hole under the conditions existent in this case. . . . The jury could have found that defendant, because of its technical knowledge, should have foreseen the danger, while the workers, without such technical information, might

not have foreseen it. Keller's testimony could be considered by the jury as weakening the opinions of plaintiff's expert, but it is not of such weight as to warrant taking the case from the jury." (Emphasis in the original.)

The *conclusion* is erroneous because, assuming arguendo the correctness of the premise, the Court overlooks the full nature of the manufacturer's duty, established by the decision on the first appeal and not expressly rejected by the present decision, namely, that the duty encompasses not merely warning against the hazard, *but prescribing the proper precautions to be taken.* Thus, although the Court recognizes that the tamping pole test is a "rather crude method"[3] for guarding against the heat hazard (212 F. 2d at p. 626), it declines to hold DuPont responsible for its failure to prescribe a proper and adequate method. In brief, assuming that Keller's testimony must be taken as gospel truth in its entirety, and that, in fact, the tamping pole was customarily used in blasting to test against heat, the situation resolves itself into one wherein the manufacturer is faced with a customary blasting procedure involving inadequate precautionary measures, and yet does nothing about it. This is clearly a "foreseeable use dangerous to human life *unless certain precautions are taken*" and it is in this circumstance that the law of Pennsylvania, as established on the first appeal, and not expressly rejected by the present Court, imposes upon the manufacturer *the duty to prescribe adequate precautionary measures.* Assuredly the tamping pole test (if its customary employment in the blasting trade is to be believed at all), was *deemed* to be adequate by those who used it. But such misinformed belief does not, as the Court now seems to hold, circum-

3. That the jury was more than justified in concluding that this test, if believed to have been used at all, was utterly worthless as a precautionary measure, will be developed later.

scribe the responsibility of the manufacturer, who knew or should have known better.

We proceed to a closer examination of the basic error and conflict inherent in the present decision, namely, the Court's determination that petitioner failed to establish lack of knowledge on the part of the user as to the heat hazard. Here, we respectfully submit, the recent decision of the Third Circuit in *Johnson v. Baltimore & O. R. Co., supra,* 208 F. 2d 633 was completely overlooked. That case likewise involved an action for wrongful death under the law of Pennsylvania. Decedent was shot and killed on Company premises by a railroad policeman, Hall, while the latter was attempting to take the decedent into custody. The simple issue of fact was whether Hall killed decedent in the reasonable belief that such killing was necessary to save his own life. That is to say, was it self-defense, or was it an unjustifiable killing. The only witness to the event was Hall himself, *who was called as a witness by the plaintiff. His testimony, if believed, established a case of self-defense.* The jury, however, found for the plaintiff. On appeal, defendant urged that plaintiff was bound by this evidence. The Third Circuit rejected the contention that when one calls a witness, everything which that witness says, so far as the party calling him is concerned, must be taken as gospel truth. It examined the historical basis for the rule and agreed with the modern authorities on the subject that it is nothing more than the remnant of a primitive notion, that there is no substantial reason for preserving it, and that it has no place in any rational system of investigation in modern society. Said the Court:

> (208 F. 2d at p. 635) "When witnesses were called by a party from among his friends to act as compurgators it was completely rational that the party calling them would have to stand by what they said. After all he chose his friends. But when witnesses are called, in some stranger's lawsuit, to tell about things they saw,

heard or did, there is no reason in logic or common sense or fairness why the party who calls them should have to vouch for everything they say.

• • •

(pp. 635-636) "Nothing could make the rule look more foolish than its application in a case like this. Only two people were present when this affray occurred and one of them died immediately thereafter. The employer of the survivor is being sued. What could be more human than that Hall would make his story show the propriety of his own conduct and the wrongfulness of that of his opponent in the fight. *And what would be sillier than to insist that the jury is compelled to believe all that testimony which the witness offered in explanation of an intentional killing on his part?*

• • •

". . . Twelve responsible citizens, under oath sworn to give their verdict on the law and evidence, have decided the fact issues. The judge has put the law accurately to them. *Whether he or we agree with their conclusion is not the determining factor.*" (Emphases supplied.)

It is important to bear in mind the nature of the factual issue involved in the *Johnson* case. It was simply whether or not the killing was or it was not justified—there was no middle ground—and the rejection by the jury of Hall's testimony to the effect that it was justifiable, necessarily left as the only possible alternative the finding that the killing was not justifiable. *Thus, rejection of Hall's testimony did not leave the record barren of evidence on this vital point.* It led, of necessity, to the conclusion that the killing was not in self-defense, and hence not justifiable.

Taking the present view of the Court below, namely that the crucial issue here is knowledge or no knowledge on the part of the user, the present decision is seen to be

clearly erroneous and in conflict with the *Johnson* decision. *For rejection of Keller's testimony concerning his awareness of the hazards of excessive heat and of the necessary precautions to be taken, does not leave the record barren of evidence on the issue of knowledge. It leads, of necessity to the conclusion that the users were, in fact, ignorant of the dangers and of the proper precautions to be taken.* That the jury was more than justified in rejecting much, if not at all, of Keller's testimony on this issue we will presently develop. More than that, much of the circumstances which warranted rejection of Keller's testimony *also at the same time constituted affirmative proof of the users' ignorance.* But were we to go no further than what has so far been demonstrated, it appears to be inescapable that in the light of the decision in *Johnson v. Baltimore & O. R. Co., supra,* the present decision should not stand.[4]

We have thus far discussed the present problem only in its most general aspects, that is, without examining precisely what the term "knowledge" really comprehends in the context of this case. An analysis of that term, in context, will firmly demonstrate, we believe, that it is impossible to declare categorically and as a matter of law, on the present or any comparable record, that the users of dynamite do or do not have "knowledge" of the hazards here involved and of the precautions appropriate to the danger. For the issue here is not merely *some* knowledge, but *adequate* knowledge.

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4. The nature of the particular fact in issue is, of course, determinative of the application of the rule laid down in the *Johnson* case. To take a hypothetical example: if the issue is whether an object is *black*, and this is an essential part of plaintiff's case, he obviously cannot sustain his burden by calling a witness who testifies that it is *red*. For disbelief that the object is red does not establish that it is black. In other words, as we see it, the rule applies only where the rejection of fact *A* necessarily leads to fact *B* as the *only* conclusion that can be reached—that is, where the two facts are, so to speak, essentially opposite sides of the same coin, so that if it is not the one it *must* be the other.

The fact which the jury must determine here is a complex one: is the *level of knowledge* of the users of dynamite, first of all, such as to *adequately* bring home to them the existence of the precise hazard, and secondly, does such knowledge, whatever its level may be, adequately equip them to cope with the danger via rational and effective precautionary measures. This "fact" must be determined with reference to the complex of circumstances surrounding the case as a whole. It admits of no categorical "yes" or "no" answer, as the Court below now undertakes to decide as a matter of law.[5] For it depends upon a qualitative evaluation of Keller's testimony in the light of numerous relevant factors appearing throughout the record in this case. Keller's testimony, even if accepted at face value, cannot establish *as a matter of law* the existence of the kind of knowledge on the part of the user that would vitiate the manufacturer's duty. A fortiori, if it be conceded that his testimony need not be taken at face value, then the ultimate fact, namely, *the precise level of knowledge sufficient to negate the duty,* becomes a variable quantity whose value cannot be judicially declared, since it depends initially upon which, and how many, of the various facts to which he testified, the jury was willing to accept or reject, and ultimately turns upon an evaluation of these jury-accepted facts in the light of such additional circumstances as, in the jury's considered opinion, bear upon the ultimate issue. In brief, what this witness said on the stand, how he has said it, its inherent credibility, its credibility and weight when tested against other relevant and significant circumstances, must all be taken into account in arriving at the ultimate

5. Compare cases such as *Lakata v. DiSandro,* 175 Pa. Superior Ct. 377, A. 2d , and *Polm v. Hession,* 363 Pa. 494, 70 A. 2d 311, which hold that where the issue of contributory negligence depends on the *degree of darkness* existing at the place where plaintiff is injured, contributory negligence will not be judicially declared *even where plaintiff testifies it was pitch dark,* if other circumstances would warrant the jury in concluding that plaintiff's testimony may have been an exaggeration.

fact. This is peculiarly a jury function and cannot be assumed by the Court.

It now becomes appropriate to turn to the record to demonstrate the point we are making. First, and of major significance, is the underlying fact that one of the principal defenses in this case was predicated upon the contention that *the hazard of heat from drilling does not exist;* and that defendant made every effort to establish that temperatures sufficient to detonate dynamite are not encountered in normal blasting operations. If the jury had accepted this as demonstrating DuPont belief (mistaken but unjustifiable), that no such hazard existed, this circumstance alone would have justified the jury in rejecting Keller's testimony, for in the face of this it would hardly be reasonable to suppose that the untrained blasting workers were nonetheless aware of it.[6]

The qualifications of Keller were typical of blasters on other projects. He had had twenty-six years' experience, limited to what he had learned in the field. He had no technical training and as far as he knew, none of the blasters did (27a). The men merely pick up information as they go along; no training courses are available, and no standards of education or training are required. Keller himself started as a helper and gradually worked up to a blasting foreman (42a, 45a). He believed that there was nothing unsafe or improper in the drilling and loading procedure followed on the project on the day of the accident. It was the usual and customary method, and was followed both before and after the accident (66a-67a, 55a). He testified that it was his responsibility on the job to issue instructions to the loaders. This he did as best he could (46a)

6. Note that in *Johnson v. Baltimore & Ohio R. Co., supra,* virtually the single circumstance of Hall's self-interest in making his story show the propriety of his own conduct and the wrongfulness of the conduct of the deceased was considered by the Court of Appeals for the Third Circuit is sufficient warrant for the jury's disbelieving that Hall acted in self-defense.

and showed his men the list of instructions (Exhibit P-1, 28a) which accompanies each box of explosives. These, coupled with DuPont's Blaster's Handbook (Exhibit P-2, 33a) are the only instructions he had ever seen (41a). It is beyond dispute and not questioned by the Court below that the instructions and handbook do not warn against the hazards here involved.

He referred to the use of a tamping pole, its function being to tamp the charge into the hole, and to see that the hole was clear and of regular depth. He stated that in addition he had instructed his men to leave the tamping pole in the borehole for three or four minutes "to judge the heat of the hole" (47a-48a), since he had always been warned about "hot holes"[7] by the men from whom he had learned to handle powder (73a). He stated he did not know that sufficient heat might be generated in a bore hole to explode dynamite, "only what I was told" (74a). If the tamping pole had come out charred, it would certainly mean a "hot hole", but he had never actually seen such an occurrence (49a). In determining whether a hole was hot, he relied on the assumption that if it was hot enough to ignite dynamite, "it should be hot enough to make your tamping pole warm on the end" (68a). How warm, he was, of course, unable to say, since he believed he had never found a hole too hot to load (68a). He merely relied on his "judgment" without any prior experience or standards to guide him in determining at what point a borehole would be too hot to safely load. Prior to the accident he never tested any boreholes to determine how much heat is gen-

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7. It is not entirely clear under the evidence whether he was here referring to heat generated by drilling, for one of defendant's witnesses, Langenfelder's drill foreman, later testified that the term "hot hole" is used among the men engaged in blasting to designate a hot broken bit left in the bore hole. This witness had never seen a bore hole become "hot" in any other way (286a). For present purposes, it is not decisive, and may be assumed arguendo, that Keller was referring to heat generated by drilling.

erated by drilling, and had no idea what temperatures were involved (72a-73a).

This, then, is the testimony of Keller. Accepting it at its face value, it seems to us to be a perfectly justifiable conclusion on the part of the jury that the *level of knowledge and awareness* possessed by blasting foremen hardly equipped their workers with the means for adequately protecting themselves against the hazards of dangerous temperatures encountered in freshly drilled bore holes. If Keller is to be credited in the use of the tamping pole test, it is apparent that he must have believed it to be adequate to insure the safety of his men. But it is equally apparent that in this belief he was grossly mistaken, for the method was undisputably woefully inadequate. The present opinion itself recognizes that the method was at least "rather crude" (212 F. 2d at p. 626). The Trial Judge, at the first trial, took judicial notice of the fact that by this method it is impossible to determine what temperatures are generated in a bore hole, and counsel for respondent had himself stated that "It is perfectly obvious that you can't gauge the actual temperature—by a wooden tamping pole." (See Joint Appendix, *Hopkins v. DuPont,* No. 10,713, pages 55a-57a.) Assuredly the jury was fully justified in finding that this test was totally worthless as a precautionary measure, and that DuPont, being bound to know its product and the conditions under which it is normally used, and being possessed of specialized and technical knowledge of the subject, should have been aware of the danger of proceeding in this fashion, and hence should at the same time have warned against it and prescribed the proper procedures.

There are, moreover, a number of circumstances in this case which amply justified the jury in concluding that Keller's level of knowledge was even lower than what his testimony, at face value, might indicate, and that his awareness of the hazard and of the precautions to be taken was, in fact, non-existent. That DuPont itself, with all of its technical resources and knowledge of the customary uses

of its dynamite did not include either in its Blaster's Handbook (Plaintiff's Exhibit 2-33a) or in the sheet of Instructions and Rules accompanying each box of its explosives (Plaintiff's Exhibit 1—28a) any reference to the heat hazard here involved, or suggest the use of the tamping-pole test as a measure of safety; that the very defense in this case was that no such hazard existed; that defendant made every effort to establish that temperatures sufficient to detonate dynamite are not encountered in normal blasting operations, and that, therefore, this could not have been the cause of the fatal explosion; that Smith, DuPont's chief expert, himself testified that he would not expect to encounter 200 degree temperatures in normal blasting operations (324a), all constituted, at the same time, both affirmative evidence of absence of awareness among the manufacturers, as well as circumstances sufficient, a fortiori, to warrant the jury in concluding that the non-technical workers in the field, such as Keller, are in fact unaware of the hazard involved, much less able to take even rudimentary precautions against them, and that Keller's "awareness", such as it was, may have been nothing more than hindsight gained after the fact.[8] We earnestly suggest that on the basis of the record in this case it is patently erroneous to conclude, as the Court below now holds, that there was no evidence of the user's ignorance of the heat hazard, let alone of the proper and necessary precau-

8. With respect to all of Keller's testimony, it would not be amiss to point out here that at the first trial Keller had testified that he had obtained the job on the Turnpike project by contacting a representative of DuPont, who, in turn, informed him of the need for a powder man and told him to see Langenfelder, a procedure he had followed in the past in obtaining jobs (Hopkins v. DuPont, Appeal No. 10,713, Joint Appendix page 19a). By virtue of respondent's objection, this line of testimony could not be developed at the second trial (27a). While this witness cannot be technically characterized as hostile, it is not unreasonable to assume that he may not have been completely unbiased. Certainly, his natural self-interest in demonstrating his own competence as a blaster is a factor which the jury need not have ignored.

tions to be taken. This holding, when viewed, as it must, in the context of the record, is tantamount to a complete negation of the proper function of the jury.

Nor is the present record less favorable to petitioner in this regard than the evidence adduced at the first trial. On the contrary, it establishes even more solidly the petitioner's case. The tamping pole test was not a newly injected factor in this case. *It was developed through the same witness at the first trial.* (*Hopkins v. DuPont,* No. 10,713, Joint Appendix, pages 42a-43a, 55a-57a.) Yet, although on the first appeal the Court held that "the jury could have found that defendant, because of its technical knowledge, should have foreseen the danger, while the workers, without such technical knowledge, might not have foreseen it" (199 F. 2d 930, 934), the Court now holds that "on the present record" a different conclusion must be reached (212 F. 2d 623, 625).

We submit that this reversal of position is completely unjustified by a comparison of the two records; it stems, on the contrary, from an incorrect evaluation of the problem before the Court, and one which is in conflict with the decision on the first appeal. The Court below seems to be completely immune to the fact that the significant differences between the first and second trial records, all, with one exception to be noted, *favored the petitioner.*

At the first trial DuPont had not yet been put to a defense, and consequently, it did not appear that one of its major defenses was to be that heat hazard does *not* exist in the customary procedures and therefore could not account for the explosion; nor did the jury then have before it respondent's elaborate attempts to prove that temperatures sufficient to detonate dynamite are *not* encountered in normal blasting operations (291a-320a; 321a-397a), or the testimony of Smith, its explosives expert, that temperatures in the range of 200 degrees are *not* to be expected in normal drilling (324a). Yet all of these circumstances are now ignored, whereas on the first appeal circumstances less con-

vincing were held to justify submission to the jury of the issue of adequate knowledge on the part of the user:

> (199 F. 2d at 933, footnote 3) "Langenfelder's blasting foreman testified that there was nothing improper in having the drills located where they were at the time of the accident. This would indicate that he, a man with twenty-five years' experience in dealing with dynamite, was not aware of the danger from vibration, as testified to by plaintiff's expert. Furthermore, defendant's technical representative, part of whose duties included the investigation of accidents and the making of recommendations based upon his findings, stated that, generally speaking, it is safe practice to load a freshly drilled hole in hard rock within three-to-five minutes after drilling. This would mean that he, too, was unaware of the danger of heat, as explained by plaintiff's expert. *It is very probable that if these two experienced men did not know of the specific risk involved, the less experienced workers would also be ignorant of the danger.*" (Emphasis supplied.)

True, the present record is minus one item of evidence. At the first trial plaintiff had called as a witness Bickel, one of DuPont's technical representatives connected with the explosives department, whose duties included the investigation of accidents and the drafting of recommendations based upon his findings. This witness had testified that he considered it safe practice to load a freshly drilled hole in hard rock within three to five minutes after drilling (Appeal No. 10,713, Joint Appendix p. 99a), and on the first appeal this Court, as above indicated, considered the foregoing as a circumstance tending to support the conclusion that the blasting workers would also be ignorant of the heat hazard. Petitioner's attempt to develop the same fact by the same witness at the second trial failed because of respondent's objection (130a-132a). But it is inconceivable to suppose

that this failure should enure to the benefit of the party whose action brought it about. Nor does the Court below, from all that can be gathered from the opinion, give any such adverse effect to this circumstance; indeed, it is no longer open to conjecture but that DuPont believed the customary blasting procedure to be safe, since it did not and does not recognize the existence of the heat hazard. As a matter of fact Smith, DuPont's explosives expert, specifically testified at the second trial that he was present throughout the entire trial, heard the testimony as to the procedure used, and considered it normal and safe (339a). The plain and crucial fact is that there are *no* significant differences between the two trial records *adverse* to petitioner's case. Under the law of Pennsylvania, as established on the first appeal, and as further exemplified by cases such as *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A. 2d 850, *Lakata v. DiSandro, supra* (175 Pa. Superior Ct. 377), and *Polm v. Hession, supra* (363 Pa. 494), the issue of adequate knowledge on the part of the users of DuPont's dynamite, as established by the evidence in this case, is a question for the jury. The present holding to the contrary is a direct reversal of the law of the case, is in conflict with the Pennsylvania law, and is patently erroneous.

Brief comment should be made, in conclusion, about an observation contained in the present opinion, which, while it does not purport to relate to the basis of the decision, nevertheless seems to hold unfavorable implications concerning the validity of petitioner's case. It is said that there is no basis for an inference that dynamite has ever before been detonated by heat generated in drilling, that witnesses of many years' experience had not known of such occurrence, that it is not contended that anyone ever before experienced a premature explosion of dynamite under the circumstances here disclosed, and that plaintiff relied exclusively upon the testimony of her expert as to the cause of the explosion (212 F. 2d at p. 625). It is true that peti-

tioner was unable to establish her case on the basis of prior experience. But, in cases such as this, that kind of proof is, from the very nature of things, unavailable. It would be as difficult to produce such testimony as it would be, for example to establish that in the year 1900 persons died of a disease which was not recognized until 1954. That in 1900 no deaths were *attributed* to such a disease is hardly a valid basis for concluding that it does not and never has existed.[9]

Investigation into the causes of prior premature explosions was hardly within the control of petitioner or her expert. They are traditionally carried out by men such as DuPont's Mr. Bickle (127a) and similar representatives of the explosives industry. Their failure to discover or to recognize the causes is no more than a repetition of history in many and diverse fields. That in the past the cause of such premature explosions may have been erroneously attributed, as in this very case, to a hot broken bit left in the borehole, is not difficult to understand, since that is of course the easiest explanation. It is the familiar story of mental inertia and the reluctance to break away from habitual modes of thinking. The development of safety in industry is studded with similar examples. If we are to be thus held chained to past mistakes, then all hope of progress is at an end.

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9. This Court will note that there is no evidence to indicate that *premature explosions* have never before occurred. All that was brought out by the witnesses referred to was that they never knew of a premature explosion to have been caused by heat or vibration, which simply means that an explosion such as this had never been *attributed* to these causes. As a matter of fact, petitioner's expert was foreclosed, on objection, from developing that according to statistical data approximately 200 men are killed in this type of accident each year. Petitioner attempted to sustain the admissibility of this testimony on the ground that statistical knowledge is properly part of the knowledge of an expert. Nevertheless, respondent's objection was sustained (257a-259a). At the same time, however, respondent's counsel himself conceded, during a colloquy with the Court, that men *are* occasionally killed in this type of accident (though the *cause* of such accidents was, of course, not conceded) (258a).

It is difficult to avoid the conclusion that the conflicting results reached below are explainable solely on "the chance of the assignment calendar".[10] Such a fortuitous outcome of this litigation ought not to be permitted to stand when it results in a reversal of the law of this case as established on a prior appeal, and should, we submit, call for the exercise of the supervisory powers of this Court.

Second Point. The Decision Below, Creating as It Does Not Merely a Conflict Within the Circuit, But a Reversal of the Law of This Case as Established on a Prior Appeal by a Different Panel of Judges, Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for This Court's Power of Supervision.

This Court has given major attention to the problem of resolving intra Circuit conflicts, which in a sense are even more disruptive of the judicial process than conflicts between the Circuits. And of the types of cases involving such conflict, none can be more disastrous than the situation here presented: the reversal, by one panel of Judges, of the law of the case as established by another panel on a prior appeal. On this aspect the case at bar is, so far as we are aware, unprecedented.

Intra Circuit conflicts have occasioned the exercise of this Court's supervisory powers in a number of instances. See, for example, *John Hancock Mutual L. Ins. Co. v. Bartels,* 308 U. S. 180, 181, 84 L. Ed. 176, 178; *Dickinson v. Petroleum Conversion Corp.,* 338 U. S. 507, 508, 94 L. Ed. 299, 300; and *Lauritzen v. Larsen,* 345 U. S. 571, 573, 97 L. Ed.

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10. "The chance of the assignment calendar which has so operated against the plaintiff might as easily have brought it success, to judge by the three most recent cases on this issue before us . . ." Clark, J. dissenting in *Hyde Park Clothes v. Hyde Park Fashions,* 204 F. 2d 223, 226 (C. A. 2).

1254, 1263 (May 1953) where the writ was granted because "at least superficially" a conflict appeared within the Second Circuit. But perhaps the most valuable and effective guarantee of harmony of decisions within the respective Circuits is the en banc procedure, sustained by this Court in *Textile Mills Sec. Corp. v. Comr. of Int. Rev.*, 314 U. S. 326, 86 L. Ed. 249, where this Court upheld the power of a Court of Appeals to order a hearing en banc. So important in the proper administration of justice in the Courts of Appeals is the en banc procedure that in *Western P. R. Corp. v. Western P. R. Co.*, 345 U. S. 247, 97 L. Ed. 986 this Court granted certiorari, vacated the orders of the court below, and remanded the case without reaching the merits, because the Court of Appeals for the Ninth Circuit had declined to entertain an application for an en banc rehearing. Said this Court:

> (345 U. S. at p. 260) "The en banc power, confirmed by Sec. 46(c) [Title 28 U. S. C.] is, as we emphasized in the Textile Mills Case, a necessary and useful power —indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate.[20] . . ."

"20. . . . That this Court has deemed the en banc power to be an important and useful device in the administration of justice in the Courts of Appeals is apparent from our action in United States ex rel. Robinson v. Johnston, 316 U. S. 649, 86 L. Ed. 1732, 62 S. Ct. 1301 (1942) and Civil Aeronautics Board v. American Air Transport, Inc., 344 U. S. 4, ante 4, 73 S. Ct. 2 (1952). In the Robinson case (U. S.) supra, where it appeared that a 'conflict of views' had arisen 'among the Judges of the Ninth Circuit,' we remanded the case 'for further proceedings, including leave to petitioner to apply for a hearing before the court en banc.' 316 U. S. 649, 650. In the American Air Transport Case (U. S.) supra, where the division of the Court of Appeals 'were unable to agree on a disposition of the case', we said, after dismissing the certificate: 'Perhaps the Court of Appeals may now wish to hear this case en banc to resolve the deadlock indicated in the certificate and give full review to the entire case'. 344 U. S. at 5."

We do not, of course, contend that a litigant is entitled to an en banc rehearing as a matter of right. But we do earnestly submit that the unprecedented situation created by the conflicting decisions in the Court below calls for remedial action. Whether the relief accorded should be by way of an en banc rehearing, or by direct review of the merits by this Court, involves policy considerations on which we do not feel we can appropriately voice an opinion. We do most earnestly suggest that this case warrants the exercise of this Court's supervisory powers in some form, to the end that relief appropriate to the situation may be accorded.

Third Point. The En Banc Power Was Erroneously Exercised by the Court Below, in Conflict With Western P. R. Corp. v. Western P. R. Co., 345 U. S. 247.

In *Western P. R. Corp. v. Western P. R. Co., supra,* 345 U. S. 247, 97 L. Ed. 986, this Court established the following propositions:

1 Title 28 U. S. C. Sec. 46(c) commits the en banc power to the majority of the active Circuit Judges.

2. In the exercise of its "general power to supervise the administration of justice in the federal courts", the responsibility lies with the Supreme Court to define the fundamental requirements of the proper exercise of the en banc power and to insure their observance.

3. Within these requirements the determination of how the en banc power is to be exercised rests with the Court of Appeals.

4. A party litigant has the standing and the right to petition a Court of Appeals for a rehearing en banc.

5. Although the Court of Appeals as a whole is not required to act upon such a petition, nevertheless the procedure adopted must provide means whereby a

majority may order such a hearing, and must enable its full membership to determine whether the Court's administration of the power is achieving the full purposes of the en banc procedure.

6. Whatever the procedure adopted, it is essential that the Court determine and clearly set forth the particular procedure it will follow, so that *litigants* as well as the members of the Court may be fully advised.

7. In promulgating the rules governing that procedure the Court should recognize the full scope of its powers under Sec. 46(c).

8. The question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division which decided the appeal.

Rule 33 of the Rules of the Court below relates to petitions for rehearing. It provides, in substance, that such a petition will not be granted unless a judge who concurred in the judgment desires it, or the Court which rendered it so determines. Rule 5(3) provides that if a rehearing is *granted* as provided in Rule 33, reargument shall be heard by the Court which heard the original argument, unless it is ordered by a majority of the active circuit judges to be heard by the court en banc. *No procedure is provided for an en banc rehearing in cases where the panel which heard the original argument denies the petition for rehearing.* Since the granting of rehearings is committed to a panel of *three* judges, whereas the en banc power must be exercised by *four* of the seven active circuit judges, it is apparent that the denial of a petition for rehearing effectively forecloses the majority of the active circuit judges from considering, *separate and apart from the question of whether there should be a rehearing before the original panel,* the question of whether the cause should be reheard en banc.

Thus in the case at bar, since all three judges of the original panel concurred in denying the petition for rehearing,[11] and since the Rules commit the en banc power to *four*, not to the original three, of the Circuit Judges, and then only if the petition for rehearing is *granted*, there appears to have been no exercise of the en banc power at all, and petitioner's right to present the en banc question has been denied as effectively as in the *Western P. R. Corp. Case, supra*, where the Court of Appeals for the Ninth Circuit expressly declined to entertain such a petition.

So far it is clear that the en banc procedure adopted by the *Rules of Court* of the Third Circuit violates the principles outlined by this Court in the *Western P. R. Corp. Case, supra*, and if this were all that appeared, it would seem an inevitable conclusion that the judgment below must be vacated. But following the decision in the *Western P. R. Corp. Case*, the Circuit Judges of the Third Circuit authorized Judge Maris to publish a statement on The Procedure of the United States Court of Appeals for the Third Circuit on Hearing and Rehearing Cases En Banc, which appears in *14 Federal Rules Decisions 91-97*.[12] In this statement a section is devoted to Rehearing En Banc After Decision (14 F. R. D. 94-96), which sets forth in detail the procedure followed. That the procedure so outlined does, in fact, with one dubious exception,[13] admirably embody the principles laid down in the *Western P. R. Corp. Case, supra*,

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11. See Order Sur Petition for Rehearing.

12. The date of the publication of this statement does not appear.

13. There is some language, of an equivocal character, which conceivably may indicate that the Court does not look upon en banc requests of litigants with favor:

(14 F. R. D. 93) "The hearing of a case in banc is not ordered at the request of litigants."

(14 F. R. D. 94) "A petition for rehearing may or may not request rehearing in banc. Whether it makes such a request is, however, wholly immaterial and does not affect in the slightest degree the procedure of the Court in considering the petition."

is evident from even a cursory reading of the statement, and need not be detailed here. Granting all of this, the question nevertheless remains whether the mere issuance of such a statement, authentic though it unquestionably is, truly comports with the fundamental requirement of the proper exercise of the en banc procedure as delineated by this Court in the *Western P. R. Corp. Case,* particularly when the *Rules* of the Court below are diametrically in conflict with the statement.

It seems to us that if the presentation of the en banc question and a ruling thereon in accordance with appropriate procedure is a recognized right which a litigant has, then it ought not to be dispensed as though it were a matter of grace, but, on the contrary, should be recognized and protected by appropriate Rules of Court. This is implicit in the *Western P. R. Corp.* decision, for, in defining the fundamental requirements, this Court speaks in terms of "promulgating the rules governing that procedure." 345 U. S. at 261, 97 L. Ed. at 996. Significantly, upon remand of the case following this decision, the Court of Appeals for the Ninth Circuit did adopt such a rule.[14] But the Rules of the Third Circuit have not been changed.

Unless the policy laid down by this Court in the *Western P. R. Corp. Case* is implemented by the adoption

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14.

"23. . . . . .

All petitions for rehearing shall be addressed to and be determined by the Court as constituted in the original hearing.

Should a majority of the Court as so constituted grant a rehearing, and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc." (As amended effective May 27, 1953).

We make no comment upon the validity of the procedure as set forth in this Rule.

of appropriate Rules of Court in each Circuit, its full scope and effect cannot be effectively carried out. It is explicit in this Court's decision that the Courts of Appeals adopt appropriate procedures not only for their own guidance but for the benefit of litigants as well, that is to say, that the procedure be made officially known to the litigants, thus making the procedure of binding force as to both. Unless this is done, litigants are in no position to determine whether or not in a particular case the procedure followed conforms to fundamental requirements. Court procedures have historically been defined by Rules of Court. Any unofficial procedure, however scrupulously followed, has the basic infirmity that it is unofficial, that it is subject to change without notice, that exception to its application may arise in a particular case, and that a litigant is never quite certain whether his rights are being fully protected. Thus it was not until Judge Maris' statement that litigants in the Third Circuit were for the first time advised authoritatively, though query whether "officially", that the procedure followed in that Circuit is not what its Rules declare.

What actually happened in the case at bar is therefore cloaked with considerable uncertainty. It may be assumed, on the one hand, that the procedure outlined in Judge Maris' statement was followed. It can, perhaps, be assumed with at least equal reason that the procedure defined in the Rules of Court was adopted. The latter assumption gains considerable force from the fact that the certified record clearly supports this latter assumption. For the order denying the Petition for Rehearing En Banc is simply designated "Sur Petition For Rehearing", with the three Circuit Judges of the original panel, only, present, and discloses the action of the Court to be: "After due consideration the *petition for rehearing* in the above entitled case is hereby denied." (Emphasis supplied.) *Nothing appears of record to indicate that the en banc question was considered or ruled upon, either by the original panel or by any other of the Circuit Judges.* It seems to us that

neither the litigants nor this Court ought to be put in the position of having to make a choice between these conflicting assumptions in order to arrive at a determination as to whether the en banc issue has or has not been properly considered and ruled upon.

To borrow from Mr. Justice Frankfurter's penetrating observation in *Malinski v. New York*, 342 U. S. 165, 169: The history of due process in America is, in no small part, the history of procedure. Lying at the core of due process is the basic principle that whatever procedure is adopted by the Courts, its certainty should never be open to doubt. We respectfully submit that the en banc power was, under the circumstances here disclosed, erroneously exercised by the Court below, and that a writ of certiorari may appropriately be granted to correct the error.

CONCLUSION.

We respectfully submit that the case at bar eminently warrants remedial action at the hands of this Court. The conflicting decisions below should be superseded by a final authoritative decision, whether such decision emanates from this Court, or from the Court below en banc. It is also of vital importance, we suggest, that the en banc procedure in the Third Circuit be clarified and established as a Rule of Court. We earnestly believe that unless this Court consents to exercise its supervisory powers in these directions, a serious and unnecessary miscarriage of justice will be perpetuated.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 11,146

LAURA B. HOPKINS, ADMINISTRATRIX OF THE ESTATE OF HOWARD T. HOPKINS, DECEASED,

v.

E. I. DuPONT DE NEMOURS AND COMPANY,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued March 4, 1954

Before MARIS, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed May 14, 1954)

By HASTIE, *Circuit Judge.*

This is the second appeal to this court in a diversity case under the Pennsylvania wrongful death and survival acts. The first appeal is reported at 199 F. 2d 930. The decedent met his death in a highway construction accident as the result of a premature explosion of dynamite, manu-

factured by the defendant and sold to the decedent's employer, a road building contractor for use in blasting. At the second trial a jury found the defendant manufacturer responsible for the accident. The defendant has appealed.

The decedent was a loader of blasting charges. On the day of the accident his employer, C. J. Langenfelder & Co., was building a portion of the Pennsylvania Turnpike. To bring the roadway to grade it was necessary to blast out some very hard rock. For this purpose some 300 boreholes were drilled at five foot intervals in a customary pattern. Late in the afternoon the loaders followed close behind the drillers. Approximately five minutes would elapse between the completion of a borehole and the start of its loading. The decedent had loaded a hole and was coiling an unconnected wire about his hand. Another hole was being drilled five or six feet away. Without apparent cause, the charge decedent had just loaded exploded injuring him fatally.

At the first trial the defendant's motion to dismiss, made at the close of the plaintiff's case, was granted. At both trials the plaintiff relied upon the opinion of a witness qualified as an expert to prove that the accident was caused by heat generated in the borehole in the normal course of drilling, or by vibration from the nearby drilling, or a combination of the two. We think, now, as we did on the first appeal, that the testimony of plaintiff's expert, particularly his answer to a detailed hypothetical question, was sufficient to create a jury issue on the cause of the explosion, although defendant now makes a substantial showing in support of its opposing theory that a hot broken drill tip left in the hole caused the explosion. But in order to recover plaintiff had to do more than introduce enough evidence to go to the jury on the cause of the explosion. Admittedly, the dynamite was not defective. Thus, the situation was one which frequently arises in negligence cases of various types where the plaintiff must show a known or foreseeable hazard against which the defendant should have guarded, by warning or otherwise, but did not. Maize v. Atlantic

Refining Co., 1945, 352 Pa. 51, 41 A. 2d 850; cf. Brabazon v. Belships & Co., 3 Cir. 1953, 202 F. 2d 904.

It is also true that a manufacturer of a very dangerous substance is held to a high degree of care in guarding against injury to those to whom the substance is supplied. Maize v. Atlantic Refining Co., supra; Restatement of Torts, Sec. 388. But beyond this generality, every case must turn upon a determination of what would be reasonable behavior by the defendant, considering his actual or imputed knowledge both of a danger and of a need to warn or otherwise protect users against that danger. Brillhart v. Edison Light & Power Co., 1951, 368 Pa. 307, 82 A. 2d 44. Koelsch v. Phila. Co., 1893, 152 Pa. 355, 25 Atl. 522. A review of the record indicates that the plaintiff's theory of the case and the court's charge comprehended these principles. What we have to decide is whether on the present record these issues should have gone to the jury at all.

We first consider the hazard alleged to have been inherent in the loading of a blasting charge in a fresh borehole before dissipation of the heat normally generated by drilling in hard rock. On the first appeal, we believed that a jury might reasonably have concluded that the defendant should have given some warning of this danger because it appeared that blasting workers and those supervising their operations, both generally and in this very case, were uninformed of the heat hazard involved in the customary procedure of loading almost immediately after drilling. However, on the present record we reach a different conclusion.

First, it is noteworthy that there is no testimony and no basis for an inference that a dynamite charge has ever before been detonated by the heat which drilling generates in a borehole. To the contrary, there was affirmative evidence of witnesses of many years experience that they did not know of any such occurrence. Plaintiff relied exclusively upon the statement of a metallurgist, testifying as an expert, that in his opinion the heat generated by drilling

in this case made the temperature in the hole about 200° F. at the time of the loading, and that this was sufficient to cause and did cause the explosion which occurred. From this alone the jury was asked to draw the inference that defendant should have anticipated this danger, and the conclusion that defendant should have warned of it. But to establish liability for failure to give a warning, plaintiff also had to prove that the user of the dynamite, in this case a contractor represented on the job by a blasting foreman, would not and did not have adequate information about the increased hazard which in the opinion of plaintiff's expert existed when the hole was loaded.

With this aspect of the plaintiff's responsibility of proof in mind we examine the evidence as to the user's information or lack of information as to the particular hazard. The key witness was the blasting foreman himself. Called by the plaintiff, he stated at the outset that he never had known of an explosion caused by the normal heat of drilling a borehole in rock. However, in this respect there is no claim that he was less informed than anyone else, including the manufacturer, because it is not contended that anyone ever before experienced a premature detonation of dynamite under circumstances such as plaintiff undertook to establish in this case. Beyond this the foreman also testified that he had been informed by people whom he considered reliable that drilling in hard rock might produce sufficient heat to cause a premature explosion if the newly drilled hole should be loaded with dynamite before cooling. He also stated his own understanding that a temperature of 200° F. would be too hot for the safe loading of a blasting charge. Finally, he said that he had instructed his men to test each hole for heat, albeit by the rather crude method of inserting a wooden pole the full depth of the hole, leaving it there for three or four minutes and estimating the temperature by observing and touching the pole when it was withdrawn.

As already stated, the foreman was the plaintiff's witness and the issue of the user's ignorance of danger was one on which plaintiff had the burden of proof. On this issue we have found nothing in the record beyond that which is outlined above. We conclude, therefore, that although the trial judge carefully included the user's ignorance of the hazard which caused the accident as an element of the case which the plaintiff had to establish in order to recover, there is no evidence that the user was uninformed of the heat hazard said to be incidental to the normal drilling of boreholes. To the contrary, the only affirmative evidence on this issue showed that the foreman had such information, believed the very temperature which plaintiff claims to have existed here would have been dangerous and directed such precautions as he deemed adequate to prevent the loading of dynamite in a dangerously hot hole. It follows that the defendant cannot be held liable if this accident was caused by disregard of the heat hazard thus known to have been incidental to drilling in hard rock.

But plaintiff's evidence comprehended other possibilities. Plaintiff's expert stated as his opinion that heat or vibration, or both, caused the accident. And the jury may have concluded that defendant should have warned of the vibration danger involved in drilling too close to a loaded hole. But that would not help plaintiff. For plaintiff's own evidence of the cause of the accident merely presented alternative possibilities with no basis for a reasoned choice among them. And we already have shown that on the present record defendant cannot be blamed for at least one of these alternatives.

In this situation the law of Pennsylvania is clear. It starts with the general proposition that the plaintiff bears the burden of proving that negligent conduct of the defendant was the proximate cause of plaintiff's injury. Erbe v. Phila. Rapid Transit Co., 1917, 256 Pa. 567, 100 A. 966; Sandt v. North Wales Foundry Co., 1906, 214 Pa. 215, 63 A.

596. But where plaintiff's evidence supports an inference that excludes liability of the defendant just as strongly as an inference that comprehends liability, a jury would have to engage in speculation and conjecture in order to attribute the accident to one rather than the other. D'Angelo v. Pennsylvania R. Co., 1930, 301 Pa. 579, 152 Atl. 743. Where plaintiff thus leaves the jury to guess as between suggested causes, there can be no recovery. Fix v. Pennsylvania Power & Light Co., 1943, 346 Pa. 598, 31 A. 2d 114; Houston v. Republican Athletic Ass'n., 1941, 343 Pa. 218, 22 A. 2d 715; Anderson v. Reading Co., 1932, 306 Pa. 246, 159 Atl. 450; Gausman v. R. T. Pearson Co., 1925, 284 Pa. 348, 131 Atl. 247. This is just such a case.

We understand the difficult position of the trial judge trying scrupulously to avoid any course of action such as this court had denominated error on appeal from the judgment on directed verdict at the first trial. However, we are now satisfied that there is no evidence in the record before us sufficient to go to the jury on the issues discussed in this opinion. Defendant's motion for judgment not withstanding the verdict should have been granted.

The judgment will be reversed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 10,713.

LAURA B. HOPKINS, ADMINISTRATRIX OF THE ESTATE OF HOWARD T. HOPKINS, DECEASED,

Appellant,

v.

E. I. DuPONT DE NEMOURS AND COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 13, 1952.

Before GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

Opinion of the Court.

(Filed November 14, 1952.)

By STALEY, *Circuit Judge.*

This diversity action is based on the Pennsylvania wrongful death and survival statutes and seeks to recover for the death of plaintiff's husband, which was caused by a premature explosion of dynamite manufactured by defendant. At the close of plaintiff's case, defendant's motion to dismiss was granted, and plaintiff now asks us to

decide that her evidence was sufficient to get her to the jury. We think it was.

Taking the evidence in the light most favorable to plaintiff and resolving all reasonable inferences in her favor, as we must, in view of the present status of the case, the following is a reconstruction of the event.

The deceased, Howard T. Hopkins, was an employee of C. J. Langenfelder and Son, Inc., a contracting firm then engaged in building part of the Pennsylvania Turnpike. On the day of the accident, the work involved blasting through a hill to bring the terrain down to the proposed grade of the highway. The dynamite and blasting caps used by Langenfelder were supplied by defendant. The blasting was to be done by the simultaneous detonation of a series of about three hundred boreholes five feet apart. The first step involved drilling the boreholes, which varied in depth, the fatal one being six feet deep. The next operation called for a crew of "loaders" who placed dynamite and blasting caps in the holes, tamped them down, filled the rest of the hole with dirt, tamped it down, and connected the wires from each hole to a trunk line so that the entire pattern could be detonated electrically.

On the morning of the accident, drilling began at about seven o'clock. There was no loading done, however, until about ten o'clock when the drillers had acquired a sufficient start. As the day progressed the loaders caught up to the drillers and throughout the afternoon worked right behind them. That is, there was an interval of approximately three or four minutes between the completion of the drilling of a hole and the beginning of the loading of it. Deceased was a loader. At about five or five-thirty in the afternoon, just before the explosion (one witness testified that it was a matter of seconds), he was seen working over a loaded and filled hole, coiling the wire around his hand. There was a drill operating within five feet of the hole. The dynamite in the hole exploded, and Hopkins was killed.

There was ample testimony to the effect that the general blasting method used was that customarily followed in construction work. The vein of rock in the area was very hard.[1] Drilling in hard rock generates more heat than drilling in soft rock. Two of deceased's co-workers testified that in normal drilling operations on this job they had seen drill steels turn blue, one of them stating that this meant that the steel was very hot. None of the workers had any technical schooling on explosives. Their knowledge of the use and specific characteristics of dynamite was learned by experience in the field.

Plaintiff's expert, a consulting materials engineer, testified that when steel becomes blue it means that it has a temperature of from 500° to 900°, depending upon the precise shade of blue. Also, from drilling experiments he had made about two years after the accident, as near to the scene as possible (about 25 or 30 feet away), with practically identical drilling equipment and in the same vein of hard rock in which the fatal hole was drilled, and in weather conditions which, if anything, would lower the results of the readings, the expert found that drilling in the hard rock produced a steel temperature of 340° Fahrenheit and a borehole temperature of 200°, and in soft rock a steel temperature of 260° and a borehole temperature of 170°. He also found that the borehole would cool off at the rate of approximately 20° in 15 minutes. He testified that blasting caps are much more susceptible to impact detonation than is dynamite, but that when heated, the instability of both is greatly increased. That is, when heated, both the caps and dynamite will detonate because of vibration or impact much more readily than when at normal temperatures. His tests showed also that the vibration caused by the drilling was very substantial near the hole and could

1. Plaintiff's expert testified that on Mohs' scale the hardness of the rock was rated at between six and seven. Diamond, on that scale, is rated at ten.

be felt 15 feet away. In answer to a hypothetical question, he testified that in his opinion the explosion was caused by heat in the borehole, or vibration from the drill being operated 5 feet away, or a combination of both heat and vibration.

Since diversity of citizenship is the basis of federal jurisdiction here, we apply Pennsylvania substantive law in accordance with Erie R. R. v. Tompkins, 304 U. S. 64 (1938). Plaintiff makes no claim that defendant was negligent in the manufacture, inspection, packing, or distribution of its dynamite. It is plaintiff's contention that defendant knew or should have known that drilling through hard rock produces sufficient heat in the borehole to explode dynamite placed therein before the hole has cooled, and that the vibration caused by drills operating within a few feet of a loaded hole is sufficient, alone or in combination with that heat, to explode the dynamite; that defendant knew or should have known that in blasting operations the boreholes might be loaded soon after drilling them and that drilling might be done close to a loaded hole; that, because defendant knew that the men working with its dynamite are given no technical schooling as to the specific danger involved, it, in turn, knew that they would not realize the risk of loading the holes too soon or of drilling too close to a loaded hole; and, in the face of that knowledge, that defendant was negligent in failing to warn of the specific danger involved.

We think that the case of Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A. 2d 850 (1945), is controlling here. There defendant put out a cleaning fluid, 45 per cent of which was made up of carbon tetrachloride, the fumes of which are deadly. Deceased was killed by inhaling the fumes while cleaning a rug. The name of the fluid, "Safety-Kleen," appeared on the four sides of the can, and, in smaller print on two sides, was placed the warning: "Caution. Do not inhale fumes. Use only in well ventilated

place." The issue left for the jury was whether defendant had given an adequate warning to probable users of the danger inherent in the fluid's normal's use. The jury found for the plaintiff, and the Supreme Court of Pennsylvania affirmed, stating that it was clear that the trial court could not say as a matter of law that defendant had fulfilled its duty to warn. The Maize case stands for the proposition that one who supplies an instrumentality for use by others, and who knows or should know that the foreseeable use is dangerous to human life unless certain precautions are taken, and who realizes or should realize that the probable user will not recognize the danger, is under a duty to warn the user of such danger and to advise the proper precautions.[2] The Maize case is even stronger than the present case because there the defendant actually did warn of the specific danger involved. The question was whether the warning was sufficiently prominent. Here there was no warning at all of the specific risk.

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2. Sec. 388, Restatement, Torts, is as follows:

"Sec. 388. Chattel Known to be Dangerous for Intended Use.

"One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be in the vicinity of its probable use, for bodily harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows, or from facts known to him should realize, that the chattel is or is likely to be dangerous for the use for which it is supplied;

(b) and has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be so."

This section has been adopted in Pennsylvania. Lambert v. Richards-Kelly Const. Co., 348 Pa. 407, 35 A. 2d 76 (1944); Ebbert v. Philadelphia Electric Co., 330 Pa. 257, 198 Atl. 323 (1938).

Defendant attempts to parry the thrust of the rule of the Maize case by saying that it is inapplicable here. Defendant tells us that everybody knows that dynamite is dangerous and that there is no need to warn against the obvious. But plaintiff's theory does not go to the generally dangerous character of dynamite. She contends that what is not known by blasting workers is that there is enough heat and vibration in a freshly drilled hole, when a drill is being operated a few feet away, to explode the dynamite placed in the hole. Everybody knows that dynamite should not be thrown in a fire, but apparently most construction workers do not know that it should not be placed in a hole under the conditions existent in this case.[3] One Keller, a blasting foreman for Langenfelder, with twenty-five years' field experience in working with dynamite but with no technical schooling on explosives, testified that he had never seen an explosion such as occurred here. From this, defendant argues that the accident was not foreseeable and, therefore, there was no negligence. As the testimony of plaintiff's expert discloses, a simple test would have demonstrated the danger of an explosion resulting from a combination of blasting caps, dynamite, and a certain degree of heat and vibration. The jury could have found that defendant, because of its technical knowledge, should have foreseen the danger, while the workers, without such technical informa-

3. Langenfelder's blasting foreman testified that there was nothing improper in having the drills located where they were at the time of the accident. This would indicate that he, a man with twenty-five years' experience in dealing with dynamite, was not aware of the danger from vibration, as testified to by plaintiff's expert. Furthermore, defendant's technical representative, part of whose duties included the investigation of accidents and the making of recommendations based upon his findings, stated that, generally speaking, it is safe practice to load a freshly drilled hole in hard rock within three-to-five minutes after drilling. This would mean that he, too, was unaware of the danger of heat, as explained by plaintiff's expert. It is very probable that if these two experienced men did not know of the specific risk involved, the less experienced workers would also be ignorant of the danger.

tion, might not have foreseen it. Keller's testimony could be considered by the jury as weakening the opinions of plaintiff's expert, but it is not of such weight as to warrant taking the case from the jury.

It is true that defendant did publish a safety list which accompanied each case of dynamite. This is a list of sixty-three "Don'ts," advising what not to do in the many phases of blasting operations. The only one even remotely touching the specific danger involved here, however, is "Don't" No. 21. It says, "Don't load a sprung bore hole with another charge of explosives until it has cooled sufficiently." A sprung hole is one usually employed in quarrying operations, in which the bottom of a plain borehole is enlarged by exploding a preliminary charge and then a larger, final charge is placed in the resulting cavity and is exploded. Naturally, the first explosion produces heat, and "Don't" No. 21 warns against loading the final charge in the sprung hole before that heat has dissipated. Thus, the warning against heat in a sprung hole could well mislead the user into concluding that there is no risk from heat in a freshly drilled plain hole. Consequently, we feel that the jury could have found that the warning was inadequate.

Next we are told that negligence may not be inferred from the mere happening of an accident; that there was no competent proof as to the cause of the accident; and that the jury may not be permitted to guess. The obvious answer is that if the jury were to believe plaintiff's expert, and we must assume that it would, the cause would be heat or vibration or a combination of the two. This would not be a guess or an inference from the mere happening of the accident. Proof to the degree of mathematical precision is not required. Before the explosion, deceased was seen near the loaded and tamped hole coiling the wire around his hand. He had completed, apparently carefully, the only actions in which his own carelessness could have caused the explosion. Furthermore, the Pennsylvania presump-

tion that deceased used due care is in plaintiff's favor.[4] The record is barren of evidence which would rebut that presumption.

Defendant asserts that there may have been other causes of the accident, for some of which it would not be liable. That there may have been other causes is true. But none of these fancied causes are fairly deducible from the evidence. This court, stating Pennsylvania law, has said that it is not necessary to eliminate every possible cause other than the one on which plaintiff relies, but only such other causes as fairly arise from the evidence. "It is not the rule that circumstantial evidence need exclude everything which the ingenuity of counsel may suggest as having possibly caused or contributed to the death." Williams v. Reading Co., 175 F. 2d 32, 34 (C. A. 3, 1949).

Plaintiff's expert testified largely on the basis of his post-accident tests. Defendant argues that conditions existing during the tests were so materially different from those existing at the time of the accident that the expert's testimony was worthless in determining the cause of the accident. Granted that the tests were made two years after the accident and twenty-five or thirty feet away from where it occurred, nevertheless, they were made with practically the same kind of drilling equipment and in the same vein of rock. True, the atmospheric temperature was five degrees higher than it was when the accident occurred, but there was a cold rain which could easily offset that factor. There were further differences, but these would, if anything, lower the test readings. Therefore, on the whole, we feel that the conditions were sufficiently similar to allow a logically relevant inference. The differences go only to the weight of the testimony. In any event, the admission of testimony based on experiments is a matter resting largely

4. Perry v. Pittsburgh Rys., 357 Pa. 608, 55 A. 2d 354 (1947); Scholl v. Philadelphia Surburban Transp. Co., 356 Pa. 217, 51 A. 2d 732, 736-37 (1947).

within the discretion of the trial court.[5] That discretion has not been abused here.

We have considered carefully all the other contentions made by defendant and find them to be without merit.

For the reasons stated, the judgment will be reversed and the cause remanded for a new trial.

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5. Navajo Freight Lines, Inc. v. Mahaffy, 174 F. 2d 305 (C. A. 10, 1949); Gaillard v. Boynton, 70 F. 2d 552 (C. A. 1, 1934). "The true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless in the discretion of the trial Court it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues." 2 Wigmore, Evidence sec. 444 (3d ed. 1940).